Supreme Court of the United States

OCTOBER TERM, 1946.

No. 33.

GULF OIL CORPORATION,

Petitioner,

vs.

CORNELIUS GILBERT, doing business under the firm name and style of Gilbert Storage & Transfer Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

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OCTOBER TERM, 1946.

No. 93.

GULF OIL CORPORATION,

Petitioner,

vs.

CORNELIUS GILBERT, doing business under the firm name and style of Gilbert Storage & Transfer Company,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONER.

Opinions Below.

The trial court filed a written opinion in this case (R. 44-54), reported in 62 F. Supp. 291. The opinion of the Circuit Court of Appeals (R. 59-67) is reported in 153 F. (2d) 883; the dissenting opinion by Judge Augustus N. Hand appearing at pages 65 *et seq.* of this record. Rehearing was denied February 23, 1946 (R. 77).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on February 4, 1946 (R. 59). Petition for Writ of Certiorari was filed April 23, 1946, and was granted on May 20, 1946 (R. 78). The jurisdiction of this Court rests

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

1.

Does the principle of *forum non conveniens* apply in this cause initiated in the United States District Court for the Southern District of New York by a resident of Lynchburg, Virginia, against a Pennsylvania corporation on an alleged tort action arising in Virginia, and where the Pennsylvania corporation, in conformity with Section 210 of the General Corporation Law of New York, appointed an agent for service, although none of its business transactions in New York has any relationship, directly or remotely, with the matters occurring in Virginia which respondent claims constitute his cause of action?

2.

Does the action of the United States District Judge, Southern District of New York, in declining to entertain jurisdiction of this action, because the retention of this cause in the Southern District of New York would be vexatious, inconvenient and wholly unnecessary, constitute an abuse of discretion where the indisputable facts disclose:

(a) Respondent (plaintiff) is a resident of Lynchburg, Virginia;

(b) Petitioner (defendant) *is a Pennsylvania corporation* but transacts business and can be sued in Virginia;

(c) All matters which it is claimed constitute this cause of action *arose solely in Lynchburg, Virginia;*

(d) There are approximately three hundred and fifty (350) persons *residing in and around Lynchburg, Virginia*, whose goods were stored in respondent's warehouse and were damaged or destroyed;

(e) The delivery of gasoline to respondent's underground storage, at which time it is claimed the fire occurred, was made by a truck owned by, and attended by an employee of, Jennings-Watts Oil Company, Inc., *a Virginia corporation domiciled in Lynchburg, Virginia;*

(f) The issues of negligence, contributory negligence, as well as the responsibility for the fire, and the question of damages will be closely contested matters;

(g) All of the witnesses who will be called to testify with respect to these issues *reside in and around Lynchburg, Virginia;* and

(h) The retention of this case in New York would frustrate the fair administration of justice in that the majority of petitioner's witnesses on principal fact issues would have to be presented via depositions.

Statement.

Respondent (plaintiff) brought this action in the United States District Court for the Southern District of New York, notwithstanding the fact that petitioner (defendant) had an agent for service in the State of Virginia (R. 38); that respondent was not a resident of New York but of Lynchburg, Virginia (R. 3); and that the cause, sounding in tort, arose in Lynchburg, Virginia (R. 3-10).

Respondent's complaint states that he is engaged in operating warehouses *exclusively in the City of Lynchburg, Virginia*, one of which he claims was destroyed by fire following an explosion which he charges was caused by petitioner's agents in permitting gasoline to escape

from a truck while in the process of making a delivery of such gasoline to respondent's warehouse (R. 7-10).

Petitioner is a Pennsylvania corporation which, in order to obtain authority from the State of New York to transact *local intrastate* business in that state, designated an agent for service of process (R. 26). Petitioner transacts business in the State of New York but none of such business has any relationship or connection, direct or remote, with the matters alleged to have occurred in Lynchburg, Virginia, upon which respondent bases his cause of action (R. 18).

Petitioner moved, through an order to show cause, for dismissal of the complaint because the inconvenience of the trial of the cause in the State of New York would impose an undue burden on petitioner as well as on the New York Court. The motion submitted by petitioner was supplemented by affidavits. In essence these affidavits resisting the maintenance of this cause in the State of New York indisputably showed that on March 8, 1944, a warehouse in Lynchburg, Virginia, belonging to respondent was destroyed by fire and the goods of some three hundred and fifty customers of respondent stored therein were damaged or destroyed (R. 3-10, 15, 24, 28).

Respondent claims that such fire and resulting damage to himself and his customers were caused by the negligence of petitioner, while among petitioner's affirmative defenses will be the claim that the negligence of respondent was the sole or at least a contributing proximate cause of the fire alleged in the complaint (R. 69, 70).

Petitioner expects to show, among other things, that it did not make the delivery of gasoline at the time and place in question but that such delivery was made by a Virginia corporation known as Jennings-Watts Oil Company, Inc., in a truck owned by it and driven by one of its employees (R. 17).

Petitioner further expects to show that said Jennings-Watts Oil Company, Inc., was an independent contractor and was not at the time of the fire a servant or employee

of petitioner (R. 18, 21, 22, 23, 24). There was a contract between petitioner and this Virginia corporation containing a clause to the effect that said company would indemnify petitioner against losses and claims such as those alleged in the complaint but petitioner cannot implead said Jennings-Watts Oil Company, Inc., in the Southern District of New York, where the action was brought (R. 17, 21, 22, 24).

The officers, agents, and employees of this Virginia corporation will be material and necessary witnesses for petitioner if it be permitted properly to defend the action (R. 17, 18, 21, 22). All of the officers, agents, and employees of said Virginia corporation are residents of the State of Virginia and it will be impossible for petitioner to bring them to New York for the trial because the process of the District Court for the Southern District of New York does not extend into Virginia (R. 12, 22, 24, 36). If this action is tried in New York the testimony of all such witnesses will have to be presented by deposition.

In order that petitioner properly present its defenses it will be necessary to prove the location and description of the premises at the time of the accident (R. 16), the nature of the gasoline storage and dispensing equipment installed on the premises of respondent, its ownership, its condition before and after the fire, whether it conformed with local laws and ordinances, etc. (R. 16).

Furthermore, it will be shown that respondent owned such gasoline storage and dispensing equipment (R. 16). Respondent's building was totally destroyed (R. 15, 70). Petitioner will have to prove its condition *before* it was destroyed in connection with its defense of contributory negligence. Among other things, petitioner expects to show the following:

1. Respondent's gasoline equipment (including pumps, tanks, fill pipes, valves, suction pipes and vent pipes) was

negligently, and in violation of local city ordinances, installed in dangerous proximity to an open fire (R. 16).

2. Gasoline or its vapors which might be spilled or might escape at the mouth of the fill pipe would descend and come into contact inside said building with an open flame where they would immediately ignite, explode and cause a fire (R. 16).

3. Respondent completely dismantled and took up all his said gasoline equipment and changed the condition thereof before he asserted this claim against petitioner.

4. This equipment of respondent constituted an inherent dangerous instrumentality within his exclusive control (R. 16).

5. This maintenance and use of said equipment amounted to gross negligence on the part of respondent, and such negligence was the sole or at least a concurrent contributing proximate cause of the fire (R. 16).

In order to prove the above facts petitioner will be required to call as witnesses the firemen, police officers, and other municipal employees who, in the course of their duties as such, examined the premises at the time of the fire as well as before and after the fire; employees and former employees of respondent and said Jennings-Watts Oil Company, Inc., and other with knowledge of such facts (R. 16, 17). Certain municipal licensing employees and inspectors will have to be called to determine the question of whether respondent's equipment in its installation and maintenance violated local safety ordinances and statutes in effect at the time of the fire (R. 16). The architects who designed respondent's building and effected any changes therein; the contractors who performed such work; the contractors who originally installed the equipment and who knew its condition; those who later made changes therein; the contractors who cleared the debris

after the fire and those who dismantled and removed this equipment after the fire and observed its condition at that time will all be necessary and material witnesses for petitioner when this action is tried (R. 17).

All of the persons who have any knowledge of the above facts reside in and about the City of Lynchburg, Virginia, (with the possible exception of the New York attorney of respondent and a so called expert witness that he himself took from New York to Lynchburg, Virginia, to investigate this fire) (R. 17). All testimony concerning the issues of negligence of petitioner and the contributory (or sole) negligence of respondent would have to be submitted to a New York judge or jury by depositions, thus depriving that court and jury of an opportunity of observing the demeanor and conduct of the witnesses while giving their testimony which will not permit a fair determination of their credibility. Neither could a jury be taken to the scene of the fire to view it as a part of the trial nor could the tank truck of Jennings-Watts Oil Company, Inc., from which the gasoline was delivered be viewed by a New York jury.

The condition of such tank truck before and after the fire may well be the subject of conflicting testimony (R. 16). The only persons who can describe such truck and explain its functioning are the officers, employees and former employees of said Jennings-Watts Oil Company, Inc., the owner of the truck, and garage mechanics who repaired it, and all such persons reside in and around Lynchburg, Virginia (R. 16).

The way in which respondent customarily ordered gasoline from said Jennings-Watts Oil Company, Inc., and the manner in which such deliveries were customarily made will be material facts. All the witnesses with any knowledge of such facts are in Lynchburg, Virginia (R. 13, 49).

Numerous of the 350 customers of respondent, whose damages will be part of the subject matter of this action,

will be material and necessary witnesses of petitioner in the trial of this action. They will be called for the purpose of proving, among others, the following facts:

1. The fair market value of their property, the damage thereto, including the original cost thereof and salvage value (R. 15).

2. The extent to which they have already been compensated for the damage and the loss resulting from said fire and by whom they were so compensated (R. 15).

3. The agreements between said customers and respondent for storage of said goods (R. 16).

4. The authority given by said customers of respondent to sue in their behalf for the damage and loss of said property, and the limitations of such authority (R. 16, 24, 28).

Most if not all of said customers of respondent reside in or near the City of Lynchburg, Virginia (R. 15, 24, 28, 30, 37).

If this case be tried in New York, the testimony of such customers will have to be read to the jury from their depositions as they are also beyond the reach of the processes of the court sitting in New York. One of said customers of respondent has already brought suit in Virginia against him and has recovered damages for the loss of such customer's property as a result of said fire and another of these customers has made a claim against Jennings-Watts Oil Company, Inc (R. 18). Some of petitioner's key witnesses have already indicated their unwillingness to come to New York (R. 22).

There are available to respondent in the city of his residence both State and Federal courts with sufficient jurisdiction to entertain this action and with power to call before it all material witnesses, and such courts could

obtain jurisdiction of the persons of all necessary and proper parties to this action and the subject thereof (R. 18, 19).

If this case is tried in New York petitioner will not be able to call on short notice witnesses who reside in Lynchburg, Virginia, 415 miles away, and who, during the course of the trial, may be urgently needed by reason of surprise testimony.

There is not a single fact in this record to justify the bringing of this action in New York City rather than in an appropriate forum at respondent's own doorstep. Respondent will suffer not inconvenience or hardship in being required to commence this suit in a court in the city of his residence, Lynchburg, Virginia (R. 75). On the other hand, to require a trial of this action in New York City would not only be unduly vexatious and oppressive to petitioner, it would likewise frustrate the fair administration of justice.

Respondent's reasons, as reflected by his counter-affidavits, brief and argument, for importing this case to New York City are that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition, and that this action, involving as it does a claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury which is surely unaccustomed to dealing with amounts of such a nature, and, further, that it would be difficult to obtain a local jury which has not already formed preconceived ideas about the case (R. 50, 65).

[1] Respondent's answer to petitioner's motion and affidavits is best summed up in Judge Augustus N. Hand's dissenting opinion, as follows:

> "The only answer of the plaintiff to these affidavits which would seem to have any importance is that some of the witnesses are scattered because of war conditions and their testimony can only be obtained by deposition; but there is no use

[Footnote continued on following page]

District Judge Leibell granted petitioner's motion and dismissed the complaint (R. 54, 55). The opinion of District Judge Leibell sets forth the reasons, in the exercise of his sound discretion, for declining to entertain jurisdiction of this cause in New York (R. 44, 54) (62 Fed. Supp. 291). Thereafter the cause was appealed and was reversed by a divided court, Circuit Judge Augustus N. Hand dissenting in a separate opinion (R. 59, 67) (153 F. (2) 883). Rehearing was denied February 23, 1946 (R. 77).

Analysis of the Opinions Below.

There are but two questions presented by this appeal: Could the district judge apply the doctrine of *forum non conveniens* and refuse to entertain jurisdiction of this tort action which arose in the State of Virginia, neither of the

[Footnote continued from preceding page]

diction of how many of these witnesses there are and there is likelihood that they will be relatively few now that hostilities have ceased. The suggestion that the plaintiff will bring witnesses to New York gives the defendant no assurance that it can obtain those it needs without being compelled to rely chiefly on depositions. *If there was ever a case where an effective defense was likely to be prevented, and the plaintiff would be given undue advantage by a trial in New York, I think this is one. The maintenance of the suit in the Southern District would be vexatious, inconvenient and wholly unnecessary and the order declining jurisdiction should be affirmed*" (R. 65). (Emphasis supplied.)

And by District Judge Leibell (quoting respondent's affidavit):

"In effect, the arguments raised by the defendant attempt to limit the plaintiff to suit solely in Lynchburg. The court can readily realize that this action, involving as it does, a claim for damages in an amount close to $400,000.00 is one which may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature, and furthermore, it may be difficult to obtain a jury which has not conceived preconceived notions concerning the facts in this case, which was widely publicized in the local newspapers. This may react in unfairness to either the plaintiff or the defendant" (R. 50).

parties litigant being residents of New York State; and in applying the doctrine, under the facts and circumstances, did he abuse judicial discretion? As Judge Augustus Hand in his dissenting opinion puts it:

> "I cannot see that anything is involved in the case at bar but the determination of whether the bringing of the action in New York was vexatious" (R. 66).

The decision of District Judge Leibell (R. 44-54), that respondent's case should *not* be tried in the Federal District Court of New York because "* * * for good and sufficient reasons hereinafter stated this Court in the exercise of its discretion should decline to assume jurisdiction of this action" (R. 47), is buttressed adequately by the relevant facts in this record.

An examination of the complete record, consisting of pleadings, affidavits and counter affidavits, giving rise to the trial court's order shows that all of the issues involved were carefully and thoroughly explored, that the matter was fully presented and, therefore, the conclusion of the trial court denying jurisdiction in the New York Federal District Court was not susceptible of appellate review. This is so because the content of the trial judge's opinion constitutes findings of fact which should, to all intents and purposes, be binding upon the appellate court, unless manifestly erroneous.

Where, as in the instant case, the judgment of the trial judge, as evidenced by his opinion, is supported by competent evidence, it is not thought that the decision to refuse jurisdiction of this peripatetic suitor's claim to litigate in New York *rather than in the place where he resides* (*Virginia*), and has available to him all of the witnesses and oral testimony as well as an adequate remedy at law, was reviewable. Recent applications of this principle may be found in *Allen Calculators, Inc.* v. *National Cash Register*, 322 U. S. 137; *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150; *Indianapolis* v. *Chase National Bank*,

314 U. S. 63, and *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282. See also *Schwartz* v. *Seldon* (2 Cir.), 153 F. (2) 334; *Aegdian Production Corp. of La.* v. *Land* (5 Cir.), 153 F. (2) 151; *Cudahy Packing Co.* v. *U. S.* (7 Cir.), 152 F. (2) 831, and *Huddleston* v. *Dwyer*, 322 U. S. 232.

Careful scrutiny of the recorded facts (R. 14-20; 21-25; 34-43) makes it abundantly clear that this suit can be more effectively tried in Virginia (where practically all of the witnesses who will testify for petitioner and respondent reside and access to the proper interpretations to local statutes and ordinances is more readily available than in New York); that needless and inexcusable expense to petitioner will be avoided and that full justice to all parties can be obtained in either the Federal or State court in Virginia.

District Court's Opinion.

The district judge's opinion makes it clear that his refusal to assume jurisdiction of this imported tort action was based on a finding that maintenance of the suit in New York would be vexatious. This is demonstrated by the following quotation from the trial court's opinion:

> "a. The customers of the plaintiff whose property was alleged to have been damaged and destroyed number approximately 350; all of them reside in the City of Lynchburg, Virginia, or vicinity, and not in the State of New York or within the jurisdiction of this court or within the reach of its processes; and many of them will be necessary and material witnesses for the defendant;
>
> "b. There are numerous lay witnesses, including firemen, police officers, and other municipal employees, as well as contractors and engineers, whose testimony will be material and necessary on behalf of the defendant, and all these persons reside in and about the

City of Lynchburg, Virginia, and are beyond the reach of the processes of this court;

"c. It will be necessary for the defendant in the defense of this action to call as witnesses certain agents, servants, officers, and employees of a Virginia corporation, to wit, the Jennings-Watts Oil Co., Inc., and all of such agents, servants, officers and employees reside in the State of Virginia, outside the jurisdiction of this court and beyond the reach of its processes; and said corporation itself may well be a necessary or proper party defendant in this action, for the reason that defendant will show that the negligence alleged in the complaint, if any, was committed by an employee of said corporation and not by an employee of defendant;

"d. Upon the trial it will be necessary to prove the ordinances of the City of Lynchburg, Virginia, and numerous applicable statutes and court decisions of the State of Virginia" (R. 46-47).

The trial judge in rendering the opinion in this cause was required to give due credence to the rights and interests of all parties in applying the New York rule of *forum non conveniens*. The realities of this record establish clearly that these requirements were fulfilled. The trial court conceived the New York rule of *forum non conveniens*, as expressed in such cases as *Douglas* v. *New York, N. H. & H. R. Co.*, 279 U. S. 377; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244, 158 N. E. 508; *Gregonis* v. *Philadelphia and Reading Coal & Iron Co.*, 235 N. Y. 152, 139 N. E. 223; *Wedemann* v. *U. S. Trust Co.*, 258 N. Y. 315, 179 N. E. 712; *Waisikowski* v. *Philadelphia & Reading Coal Co.*, 228 N. Y. 581 and *Williamson* v. *Palmer*, 43 N. Y. S. (2) 532, to be one of substantive law. Therefore, in the exercise of judicial discretion, *supported by indisputable facts*, the trial judge properly decided that, under the authority of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64,

he was bound by these decisions to the same extent that they would be binding upon a State Court in New York. Whether the decisions just cited constitute but "instructive precedents" or whether they are to be viewed in the same light as District Judge Leibell conceived them, the New York rule of *forum non conveniens*, under the facts and circumstances, is applicable to the case at bar. No distinction has ever been made (and none logically can be made) between personal torts and injuries to property similar to that asserted by respondent (cf. Judge Augustus Hand in his dissenting opinion, R. 66).

The record further demonstrates that the trial judge exercised sound discretion and that the requirements of "orderly, effective administration of justice" (*Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312) were properly respected and administered.

Circuit Court Opinion.

The majority in the Circuit Court hold that the pronouncements of this Court in *Nierbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, and *Williams* v. *Green Bay & Western R. Co.*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, now preclude a trial judge from refusing jurisdiction, in the exercise of judicial discretion, of this imported tort action where both parties reside outside the area of New York, because of the venue holding in the *Nierbo* case and that the opinion in the *Williams* case now restricts district judges in the application of the doctrine of *forum non conveniens* solely to cases embracing interference with the internal affairs of a foreign corporation; and, further, that the opinion by Mr. Justice Douglas qualifies the holding in *Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123. Moreover, this Court in the recent cases of *Meredith* v. *Winter Haven*, 320 U. S. 228 and *Markham* v. *Allen*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 254, has emphasized that

trial courts cannot refuse jurisdiction because of difficulties of decision.

The *Nierbo* case has no application to the case at bar because it deals strictly with the question of venue. The sole question in this cause is: Did the trial judge abuse judicial discretion, under the facts and circumstances, in declining to entertain jurisdiction of this foreign tort action which arose in the State of Virginia—neither of the parties litigant being residents of the State of New York—and in applying the rule of *forum non conveniens?* The problem which this Court had before it in the *Nierbo* case was an entirely different situation from that presented by this record. Indeed, the issues in the *Nierbo* case were extremely more difficult than those raised in this cause. Even if venue was an issue in this cause, which it is not, the *Nierbo* case would have no application, because Bethlehem Shipbuilding Corporation had been impleaded as a party in the case which was properly brought in the New York court, and because *trial convenience* dictated that the entire dispute should be concluded in the suit which had already been initiated. The defendants, other than Bethlehem Shipbuilding Corporation (in the *Nierbo* case) were apparently not subject to suit in Delaware (the place of Bethlehem Shipbuilding Corporation's incorporation) and it is further apparent that none of the other defendants were subject to suit in New Jersey where the plaintiff resided.

There are strong implications in the *Nierbo* case which sanction the action of Trial Judge Leibell in refusing to retain jurisdiction of this foreign action because the opinion indicates clearly that considerations of trial convenience, efficiency of the judicial process, economic welfare and development, and the status of the organization of the federal court system, should be applied in determining jurisdiction with respect to foreign corporations which transact business in other states where they enjoy the privileges and benefits accorded domestic entities.

The decision in the *Nierbo* case does not restrict a trial judge in exercising his discretion where the facts show that needless inconvenience and unnecessary hardship is created by the bringing of an action hundreds of miles from the defendant's place of business and the place where the action arose, as is the situation in the instant case, nor does it in any manner repudiate the requirements of "orderly effective administration of justice." *Davis* v. *Farmers Cooperative*, 262 U. S. 312.

Williams v. *Green Bay and Western R. Co.*, —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, recently decided by this Court, held that a lower court's judgment of the *facts* upon which dismissal had been granted was unsound. The decision does not question the right of the lower court to use its discretion in dismissing the case. Mr. Justice Douglas, writing the opinion for the Court, stated that the facts were such that the trial of the case in New York would not be unreasonably vexatious or burdensome to any of the litigants. As was pointed out, the plaintiff was a resident of New York, five of the defendants' six directors were to be found in New York, directors' meetings were customarily held in New York, records were kept in New York, and financial and traffic offices were maintained in New York. "The facts", Mr. Justice Douglas wrote, "plainly indicate to us that it would not be vexatious or oppressive to entertain this suit in New York, whether the availability of witnesses or any other aspect of a trial be considered."

The whole question in the *Williams* case, *supra*, was one of fact, not of the lower court's right to dismiss if the facts had been different. Presumably, if the facts had indicated that it would have been "vexatious or oppressive to entertain this suit in New York", the lower court's dismissal would have been upheld.

Even the concurring opinion of Judge Frank questions Judge Clark's application of the opinion in *Williams* v.

Green Bay & Western R. Co., —— Sup. Ct. ——, 90 Law Ed. Advance Opinions 247, to the doctrine of *forum non conveniens* (R. 65).

In neither *Meredith* v. *Winter Haven* nor *Markham* v. *Allen, supra*, is the question of trial convenience raised. These cases hold that diversity jurisdiction will not be denied a suitor merely because a state court could more appropriately interpret local state laws, and once such jurisdiction be properly invoked the Federal Court must decide questions of state law necessary for a proper judgment.

On the same date that the decision in the instant case was handed down by Judge Clark, the same court (Second Circuit) speaking through Judge Swan, in the case of *Koster* v. *Lumbermens Mutual Casualty Co.*, 153 F. (2) 888, recognized the holding in the *Williams* case to be that a trial judge has the authority to decline jurisdiction in a cause where the maintenance of such suit would be vexatious or oppressive.[2]

Rogers v. *Guaranty Trust Co.*, 288 U. S. 123, represents the generally accepted principle that a district judge is free to exercise sound discretion in passing upon the merits of a controversy and to decline jurisdiction in a case where considerations of convenience, efficiency and justice require it to be done. The mere fact that the *Rogers* case, *supra*, involved a suit against a corporation does not permit of the conclusion that a trial judge can exercise his sound discretion *only* in cases related to the internal affairs of foreign corporations. Therefore, it seems to us that the reference to the *Rogers* case, *supra*,

[2] "The last paragraph of the opinion in the *Williams* case, *supra*, implicitly recognizes that jurisdiction may be declined if maintenance of the suit will be vexatious or oppressive, but holds that the facts there appearing do not lead to that conclusion, 'where the availability of witnesses or any other aspect of a trial be considered.'" (153 F. (2) 891).

in the majority opinion, is of no force and effect in so far as it is intended as an authority against the position maintained by this petitioner, that is, that a district court *may, in any case,* in the exercise of a sound discretion decline to accept jurisdiction of a case and require plaintiff to seek his remedy in the proper forum, where the facts and circumstances show that convenience, efficiency and justice justify such judicial action.

The *Rogers* case, *supra*, neither adds to nor subtracts from the inherent power of the trial judge to exercise a sound discretion based upon the facts in the case. The *Rogers* case, and numerous other decisions of this court, make it clear that the power of a district judge to so exercise a sound discretion is independent of statutory mandate, and is not confined to litigation merely embracing the internal affairs of a foreign corporation, or where the suit is limited to the recovery of a money judgment.

The majority opinion leaves the impression that a "mystic line" exists in this case which the majority "dare not enter without state tutelage." We take this to mean that the majority opinion is in doubt as to whether the application of the doctrine of *forum non conveniens* as applied by the state courts in New York should likewise apply in the federal courts. We know of no authorities, either in New York State or elsewhere, which preclude a federal court sitting in New York from applying the rule obtaining in the state courts.

On the contrary, the New York court of last resort has consistently upheld the right of a trial judge to exercise a sound discretion in refusing jurisdiction of a case for trial purposes where, as here, all of the submitted facts show that respondent has available to him an adequate forum at his own doorstep and retention of this case in New York places petitioner at a serious disadvantage in presenting its case. Although New York State had definitely determined this issue, Judge Clark apparently ignored these unquestioned adjudications and completely

reversed the position taken in the majority opinion in *Spector Motor Service v. Walsh* (2 Cir.), 139 F. (2) 809, 822, where it was noted:

> "We are bound to accept state law as we find it, and can hardly justify exposition which adds by assuming, only to clarify. Since we do not find a definitive state determination we must conclude * * * that jurisdiction exists for our judgment herein."

We respectfully suggest that, under the holding and reasoning in the majority opinion, the court below has, in effect, ruled that a trial judge may no longer exercise sound discretion in refusing to accept jurisdiction of a case, even though indisputable evidence shows that the suitors are both foreigners; the cause of action arose elsewhere; the defendant is put to an unnecessary and inexcusable expense; is prevented from making an effective defense and the plaintiff given an undue advantage in that defendant will be forced to present its case through depositions because his witnesses refuse to travel 415 miles to testify in person.

Manifestly, there is no justification in law, or elsewhere, to deprive a defendant of his traditional right to properly present his defense through the medium of his witnesses in person.

By no stretch of the imagination can it be said that petitioner herein, under the majority opinion, has been accorded, due consideration being given to the indisputable record in this case, his traditional right to *properly* present his side of the cause as the law authorizes.

To suggest, as the majority opinion does, that petitioner did not make out a strong case on the score that to maintain this litigation in New York would be vexatious and oppressive, is, we submit, to flout both the record and common experience.

Specifications of Error.

THE CIRCUIT COURT OF APPEALS ERRED:

I.

In not holding that the doctrine of *forum non conveniens* applied in this cause.

II.

In not holding that the disposition of the motion by the District Judge in declining to assume jurisdiction of this action did not constitute abuse of discretion under the facts here disclosed.

ARGUMENT.

1.

The trial court possessed the discretionary power and authority to refuse jurisdiction of this case.

Since respondent assigns as a reason for maintaining his suit in New York that the sum of $400,000.00 would stagger the imagination of a Virginia jury, his real purpose of importing the case rests in the hope of securing a larger judgment in New York than in Virginia.

Mr. Justice Jackson in the concurring opinion in *Miles v. Illinois Central R. Co.*, 135 U. S. 698, takes sharp issue with the apparent present day tendency to import litigation to a jurisdiction where it is thought more favorable action will obtain:

> "So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employer's Liability Act may go shopping for a judge or a jury believed to be more favorable than he would find in

his home forum. An advantage which it is hoped will be reflected in a judgment is what makes plaintiffs leave home and incur burdens of expense and inconvenience that would be regarded as oppressive if forced upon them. * * *

"The judiciary has never favored this sort of 'shopping for a forum'" (p. 706).

The majority opinion in the *Miles* case, *supra*, gives credence to a statutory mandate which it felt impelled to follow rather than the equitable doctrine which has existed for many years and allows a trial court to exercise a sound discretion on matters affecting jurisdiction.

The New York courts have also maintained the validity of their statute providing for discrimination predicated on residence. This statute which was discussed in the case of *Marnan* v. *Wabash Ry. Co.*, *supra*, was upheld by this court in *Douglas* v. *New York, N. H. & H. R. Co.* (279 U. S. 377). This latter case involved directly the interpretation of the New York legislation relating to suits by non-residents against foreign corporations. The suit was under the Federal Employers' Liability Act for personal injury. The injuries were inflicted in Connecticut. Plaintiff was a citizen and resident of that state while defendant was a Connecticut corporation doing business in New York where the suit was initiated. The trial court dismissed the action, upon motion, on the theory that the statutes of New York gave the trial court discretion in the matter. Contention was there made that under the Employers' Liability Act no such discretion existed and that thus the trial court was without authority to decline jurisdiction. Mr. Justice Holmes in writing the opinion in the *Douglas* case overruled this contention by saying:

"There are manifest reasons for preferring residents in access to often overcrowded Courts, both in convenience and in fact that, broadly speaking, it

is they who pay for maintaining the Courts concerned" (p. 387).

In the same case Mr. Justice Holmes particularly pointed out that Article IV, Section 2 of the United States Constitution, providing that

> "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States",

was not molested in the least by upholding the constitutionality of the New York statute involved in the *Douglas* case. Mr. Justice Holmes stressed the narrow interpretation placed upon such statute and concluded that the provisions of Article IV, Section 2, of the United States Constitution was not violated for

> "A distinction of privileges according to residence may be based upon rational considerations and has been upheld by this Court, emphasizing the difference between citizenship and residence * * *"

The permissible discretion authorized in the *Douglas* case, *supra*, is buttressed by the following cases: *Chemung Canal Bank v. Lowery*, 93 U. S. 72, and *Canadian Northern Ry. Co. v. Eggen*, 252 U. S. 553.

The *Douglas* case, *supra*, also calls attention to the fact that *Gregonis v. Philadelphia & Reading Coal & Iron Co.*, 235 N. Y. 152, represents the prevailing rule in New York state, which was accordingly upheld.

Thus, whether we regard these decisions emanating from the New York courts as "instructive precedents", or as matters of vital substantive law, the conclusion is inescapable that District Judge Leibell had ample authority to reject jurisdiction in this case not only because the facts are overwhelmingly in favor of rejecting this imported suit but because the unequivocal rule in New York, plus the inherent equitable authority vested in all courts,

Federal and State, forbade the taking of an opposite course.

Congress has not prescribed a different rule or procedure as a guide to federal courts. The majority holding of the court below seems inclined to the belief that the United States courts cannot apply the rule of *forum non conveniens* to tort claims involving property damage.

The circuit court likewise treats the doctrine as though it were an historic accident.

The decision of the court below, we submit, incorrectly disposes of the real issue in this cause. If this decision is permitted to stand it is quite apparent that many courts will seize upon both the holding and the language employed in the majority opinion completely to emasculate an equitable principle which has been recognized and applied for more than half a century. The decision in the instant case, if approved by this tribunal, will prove an effective opening wedge for the return of "a perambulating suitor * * * to scan a list of the judges in the United States until he finds one believed to have an attentive ear, and then drag all interested into his tribunal" (*Lefebvre-Armistead Co.* v. *Southern P. Co.*, 142 Va. 800, 128 S. E. 244, 245).

The principle adopted and followed in the New York courts is apparently based on the fact that in reaching the conclusion as to whether jurisdiction should be entertained or rejected is a matter that is addressed to the sound discretion of the trial judge since he has the inherent power to allow or decline jurisdiction in any *imported* case (*Bagdon* v. *Philadelphia & R. Coal & I. Co.*, 165 N. Y. Supp. 910). Close scrutiny of the applicable New York cases dealing with the rule of *forum non conveniens* invoked in that jurisdiction cannot but impress one with the fact that unquestionable fairness is exercised by such courts in solving troublesome situations. None of the New York cases attempts to set a specific pattern to be

followed by the trial judges for the apparently good and sound reason that the principle of *forum non conveniens* "was designed as an 'instrument of justice'" (*Williams* v. *Green Bay & W. R. Co.*, —— S. Ct. ——, 90 Law Ed. Advance Opinions 247).

The collective force of the indisputable facts which show that respondent based his claim for jurisdiction in the New York court on no meritorious ground, guided District Judge Leibell in rendering his decision that respondent's claim for jurisdiction in New York would invoke an undue hardship on petitioner and that respondent's suit if tried in New York would prove vexatious and oppressive to this petitioner. No legitimate reason is advanced by respondent for retention of this case in the New York court except that in *his* judgment the "claim for damages in an amount close to $400,000, is one which may stagger the imagination of a local jury" (R. 50 and p. 15, Respondent's brief in opposition). Opposed to respondent's trivial reason for jurisdiction in the New York court, petitioner developed facts which show quite clearly that it would be required to present practically all of its material evidence in deposition form, and that it would be utterly impossible to implead Jennings-Watts Oil Company, Inc., with which company petitioner operated under a contract by the terms of which said company indemnified this petitioner from damage or injury to respondent growing out of negligence of its employees. Further, that some of the witnesses had indicated their unwillingness to appear in New York and that such material evidence would vanish since such witnesses were beyond the reach of the New York courts.

Trial of this cause in New York constitutes vexatious litigation against petitioner because, among other things, it is deprived, under the circumstances, of the invaluable privilege of cross-examination in the presence of the jury or of the court. The "crucial test of credibility" is a most important factor in the final disposition of cases of this

nature. There are types of actions where a fair and accurate appraisal of evidence cannot be given unless witnesses give their testimony in the hearing of court and jury. The average tort action involving, as it often does, closely contested issues of negligence and contributory negligence falls in this class. Thus, retention of this case in New York means that petitioner, for the purpose of establishing its defenses, must rely solely on the office of depositions. This method of presenting proof either before the court or the jury puts petitioner to a distinct disadvantage in that the court or jury is deprived of observing the demeanor of witnesses, which has always been recognized and considered a highly useful method of determining the truth of their recitations. As the court has said "a deposition has always been, and still is, treated as a substitute, a second best, not to be used when the original is at hand" because it deprives "of the advantage of having the witness before the jury" (*Napier* v. *Bossard* (2 Cir.), 102 F. (2) 467, 468-469). It has been noted that since "the appearance and manner of the witness" is frequently "a complete antidote" to what the witness states, "we cannot very well underestimate the importance of having the witness examined and cross-examined in the presence of the court and jury" (*Barron* v. *People*, 1 N. Y. 386, 391). As a Georgia Judge (Lumpkin) put it "the oral testimony of the witness, in the presence of the court and jury is much better evidence than his deposition could be" (*Hawmock* v. *McBride & McBride*, 6 Ga. 178, 183).

"It is sometimes difficult and impossible to get so full, explicit, and perspicuous a statement of facts from the witness through a deposition as it is by his examination before court and jury." (*Pinson* v. *Atchison, T. & S. F. R. Co.* (C. C. Mo.), 54 Fed. 464, 465.) "The right of a party, therefore, to have a witness subjected to the personal view of the jury is a valuable right of which he should not be deprived * * * except by necessity. And that necessity ceases whenever the witness is within the power of the Court, and may be produced upon the trial."

(*Brewer* v. *Beckwith*, 35 Miss. 467, 472.) For, as was stated in *U. S.* v. *Barton*, 25 Fed. Cas. #14,919, at page 770 "sometimes a witness may be unimpeached as to general character, and may be uncontradicted either by others, or be perfectly consistent in his statement; and yet, from his deportment on the witness' stand, render himself unworthy of credit. A hesitating or confused manner, or a studied narrative of which a jury may judge from all that accompanies the delivery of the testimony, will justly cast a shade of doubt upon it all."

Thus, since "credibility" is necessarily involved, and becomes a vital factor in the final disposition of this matter, petitioner ought to be entitled to a trial where the jury or the court can observe the various witnesses while testifying. This ought to be the law—in fact, it is the law—because "the competence of evidence in the end depends upon whether it is likely, all things considered, to advance the search for the truth." (*U. S.* v. *Krulewitch* (2 Cir.), 145 Fed. (2) 76, 80.)

Judge Coxe remarked that "a witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony, when read, may convey a most favorable impression." (*Untermeyer* v. *Freund* (C. C. N. Y.), 37 F. 342, 343.) It is fundamental that a deposition "cannot give the look or manner of the witness; his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration;"—it "is * * * or it may be, the dead body of the evidence, without its spirit * * *" (Sir John Coleridge in *Attorney General* v. *Bertrand*, 4 Moo. P. C. N. S. 460, 481).

Since the decision in a case of this type is more frequently reached on the basis of the reliability of witnesses, and since it is impossible for petitioner to require its witnesses (all of whom reside in Virginia) to appear in person in New York, an effective defense is prevented and an undue advantage given respondent.

To suggest that petitioner can just as well produce his evidence via deposition as it could with the actual presence of its witnesses is to trifle with serious fundamental issues and, at the same time, lend support to a mere sham.

Another reason why respondent should not be permitted to maintain this *imported* case in the New York court is that there are available to him in his home city State and Federal courts with power necessary to entertain and try this cause, compel the personal attendance of witnesses and make available maps, plats, local ordinances and statutes.

Under the facts and circumstances of this record "it was for the district judge to consider the facts appearing and the inferences which he might draw from them and reach his own conclusion as to the convenience of witnesses as well as the other factors upon which he decided that justice would be best served." (*Charter Shipping Co. v. Bowring, etc.*, 281 U. S. 515.)

Authority of the trial court to exercise such discretion under the circumstances here presented is just as implicit as authority of the trial court to exercise discretion in granting parties leave to amend pleadings, allowing continuances, permitting the taking of a nonsuit, granting and refusing a new trial, and numerous other activities commonly accepted as resting within the trial court's discretion.

Respondent, under the circumstances of this case, in filing his suit in the New York court could not insist upon the suit being retained in New York as a matter of *right. Such right does not exist.* On the other hand, it would have been positively unjust for the district judge on the basis of the showing made by both parties to have permitted jurisdiction to attach in New York.

Independent of any statutory mandate, and irrespective of the nature of the action, that is, be it transitory or local, a personal tort or tortious injury to property, the New York court possesses the inherent equitable power

to decline jurisdiction of this cause. That District Judge Leibell properly concluded that the facts developed at the hearing in his court did not justify retention of this cause in the State of New York is demonstrated by Judge Augustus N. Hand's dissenting opinion (R. 66).

The power of a court in the exercise of a sound discretion to determine jurisdiction is plenary. It is not restricted simply to torts or to particular kinds of litigation. The power to grant or refuse jurisdiction under general powers of a court of equity covers every type of action regardless of the presence or absence of specific statutory provisions. The reasons for declining or granting jurisdiction vary considerably. No hard and fast mechanical rule is employed by the courts in reaching a decision as to how best the ends of justice will be served. As one writer has said:

> "Upon what has come to be known as the doctrine of *forum non conveniens*, some courts have, without resort to statute, refused to entertain jurisdiction in cases involving certain causes of action when a suit is between non-residents or aliens. The reasons for refusal vary considerably. They include unwillingness to extend local judicial facilities to non-residents or aliens when the docket may already be overcrowded; the belief that the non-resident plaintiff sought the forum to secure procedural advantages, or to annoy the defendant; and the belief that the matter could be better tried elsewhere." (Stumberg, Conflict of Laws (1937) 150.) See also Foster, *Place of Trial*, 44 Harvard L. Rev. 41, 50.

It has been generally recognized from the early days of American jurisprudence that *courts have a discretionary power to dismiss* cases where the parties are aliens or foreign corporations (*Davis* v. *Farmers Co-operative Co.*, 262 U. S. 312; *Charter Shipping Co.* v. *Bowring, etc.*, 281 U. S. 515; *The Belgenland*, 114 U. S.

355; *Discontogesellschaft* v. *Umbreit*, 127 Wis. 651, 106 N. W. 821, affirmed 208 U. S. 570; *Michigan Cent. R. Co.* v. *Mix*, 278 U. S. 492; *Cole* v. *Cunningham*, 133 U. S. 107; *Williams* v. *Green Bay & W. R. Co.*, —— S. Ct. ——, 90 Law Ed. Advance Opinions 247; *Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244; *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315; *Gregonis* v. *P. & R. C. & I. Co.*, 235 N. Y. 152, and *Universal Adjustment Corp.* v. *Midland Bank*, 184 N. E. 152).

The English rule is stated by Sir Gorell Barnes in *Logan* v. *Bank of Scotland*, 2 K. B. 495, 73 L. J. K. B. N. S. 794:

> "The English courts are freely open to persons, foreign to this country seeking to enforce their rights against our corporations, companies, and citizens, in cases in which the courts can properly exercise jurisdiction; but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent court."

To the same effect is the statement of Lord Shaw of Dunfermline in *Societe du Gaz de Paris* v. *"Le Armateurs Francais"*, 1926 S. C. (H. L.) 13.

In *Universal Adjustment Corp. v. Midland Bank*, 184 N. E. 152, Chief Justice Rugg writes:

> "Where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum. This is the doctrine of our own decisions. It prevails generally * * *. Judicial discretion is a common term in the law, and to it appeal is frequently made". (pp. 158-159).

In *Baltimore & O. R. Co. v. Kepner, supra*, Mr. Justice Reed states quite frankly that notwithstanding admitted venue the trial court has the inherent power to prevent inequities which flow from the filing of a cause of action in a foreign jurisdiction when a convenient and properly constituted forum is available to a plaintiff at his own doorstop. The reasons stated by Mr. Justice Reed in the *Kepner* case for affirming the judgment of the Supreme Court of Ohio are that Section 6 of the Federal Employers' Liability Act prevented the trial court from refusing jurisdiction in said case. Thus, the majority opinion in the *Kepner* case, *supra*, followed the specific provisions of the F. E. L. A. statute at the cost of ignoring, *without denying*, long established and reasonable principles of equity and the rule of *forum non conveniens*. This choice of the majority in both the *Miles v. Illinois Central* and *Baltimore & O. R. Co. v. Kepner* cases, *supra*, however, did not destroy the applicability of these equitable principles in causes not covered by the F. E. L. A. or some other applicable statute.

In the case at bar the trial court was free (within undefined limits) to exercise rather comprehensive discretionary power in entertaining or refusing to entertain a case imported by a non-resident. *Davis v. Farmers Co-operative Co.*, 262 U. S. 312; *Murnan v. Wabash Ry. Co.*, 246 N. Y. 244; *Gregonis v. P., C. & St. L. Co.*, 235 N. Y.

152 and *Wedemann* v. *United States Trust Co.*, 258 N. Y. 315.

One of the tests applied by trial courts in determining whether or not jurisdiction should attach in a given case is *reasonableness*. All courts have tried to strike a reasonable balance among all interests. As Chief Justice Rugg of the Massachusetts Supreme Court said in rendering the court's opinion in *Cresson* v. *Erie R. Co.*, 180 N. E. 160:

> "The problem is to balance interests of individuals in enforcement of private rights, on the one side, against the interests of the public as a whole in untrammeled and efficient interstate transportation on the other side."

In short, there is abundant legal sanction for determining place of trial on the basis of the *reasonableness* or the *unreasonableness* of the burden placed on interstate commerce, convenience of the parties, and other factors which make the bringing of a suit in a particular jurisdiction vexatious or oppressive.

In *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, this court denied a Minnesota court's right to try the case on the ground "that litigation in States and jurisdictions remote from that in which the cause of action arose entails absence of employees from their customary occupations; and that this impairs efficiency in operation and causes, directly and indirectly, heavy expenses to the carriers."

In *A. T. & S. F. Ry. Co.* v. *Wells*, 265 U. S. 101, this court, dealing with a case like the *Davis* case, *supra*, arrived at the same conclusion, and forbade trial in a foreign state on grounds of unreasonable burden to interstate commerce.

In *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492, the facts in the case (which involve the F. E. L. A.) were held not to "make reasonable the imposition upon interstate commerce of the heavy burden which would be entailed in trying the cause in a State remote from that in which the accident occurred and in which both parties resided at the time."

And in *Denver & R. G. W. R. R. Co.* v. *Terte*, 284 U. S. 284, which was another case involving the F. E. L. A., this court held that one of the railroads involved was improperly sued in a foreign court because such a suit constituted an unreasonable burden on interstate commerce.

Likewise, many decisions in the lower federal courts and in the state courts (*Harris* v. *American Ry. Express Co.*, (C. C. A. D. of C.) 12 F. (2d) 487; *Paustwowe Zaklady Graviozne* v. *Auto Ins. Co.* (D. C. N. Y.) 36 F. (2d) 504; *Murnan* v. *Wabash Ry. Co.*, 246 N. Y. 244) have been based, whichever way the decision turned, on the finding that suits entertained in particular courts would or would not create an unreasonable burden on interstate commerce.

State statutes (like that of New York) permitting state courts to exercise their discretion in rejecting imported suits have been upheld by this court (*Douglas* v. *N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377). The only exceptions to this generalization are cases in which the F. E. L. A. is involved, and in which the court has felt itself bound by specific statutory mandate governing such cases (*Baltimore & O. R. Co.* v. *Kepner*, 314 U. S. 44; *Miles* v. *Illinois Cent. R. R. Co.*, 315 U. S. 698).

The broad considerations *which have guided, may guide, or should guide a court in exercising its discretionary powers to dismiss*, find origin in, Mr. Justice Brandeis' phrase, an "orderly, effective administration of justice" (*Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312).

Slightly more specific is the language of this court in *Langnes v. Green*, 282 U. S. 531, with reference to judicial discretion in deciding whether to refuse or accept jurisdiction:

> "When invoked as a guide to judicial action it means a sound discretion, that is to say, a discretion exercised not arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

Judge Stone of the Minnesota Supreme Court in *Boright v. Chicago R. I. & P. R. Co.*, 230 N. W. 457, filed a vigorous dissent, holding that even the specific statute of the F. E. L. A. should not outweigh the old principles of orderly effective administration of justice. He held that discretionary "power to dismiss on the ground of *'forum non conveniens'*" existed in the trial court. The Minnesota courts, he said, were perfectly free, "as a matter of grace, of interstate or international courtesy" to try the case in question, or "with equal right, we could decline to exercise our jurisdiction on the grounds of *forum non conveniens*." Whether to entertain or to dismiss was left to the discretion of the trial courts. The courts have that discretionary power, Judge Stone maintained. "Wholly immaterial is the source of the power * * *. Our district court has all the power that could be given it by statute. Its powers 'are neither defined nor restricted by the constitution; nor does its original jurisdiction depend in any degree upon legislative action.'"

Chief Justice Rugg presents the whole matter with the utmost clarity and force in rendering his court's decision in *Universal Adjustment Corp. v. Midland Bank*, 184 N. E. 152, non-resident companies both:

> "The governing principle in such circumstances is that the parties have standing in the courts of the

> Commonwealth, not as a matter of strict right but only as a matter of comity. * * * Where it appears that complete justice cannot be done here, that the defendant will be subject to great and unnecessary inconvenience and expense, and that the trial will be attended, if conducted here, with *many if not* insuperable difficulties which all would be avoided without special hardship to the plaintiff if proceedings are brought in the jurisdiction where the defendant is domiciled, where services can be had, where the cause of action arose, and where justice can be done, our courts decline to take jurisdiction on the general ground that the litigation may more appropriately be conducted in a foreign tribunal. Stated succinctly, the principle is that where in a broad sense the ends of justice strongly indicate that the controversy may be more suitably tried elsewhere, then jurisdiction should be declined and the parties relegated to relief to be sought in another forum" (p. 158).

There have been numerous decisions by various lower courts declaring, in effect, that a court having jurisdiction in a case has no choice but to exercise that jurisdiction. On the other hand, as early as 1923, in *Davis* v. *Farmers Cooperative Co.*, 262 U. S. 312, this court began to resist the tendency of plaintiffs to go shopping for a forum. In the case mentioned Mr. Justice Brandeis, writing the majority opinion, stated: "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to a suit in a state in which the cause of action did not arise, in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside." Subsequent decisions (also written by Mr. Justice Brandeis) developing the point of view set forth in the *Davis* case brought out, among other principles, the interesting point that

"debts or tangible assets of the defendant within the state will not justify a clearly vexatious suit" "within the state" (*A. T. & S. F. Ry.* v. *Wells* (1924), 265 U. S. 101).[3]

In 1929, in *Douglas* v. *N. Y., N. H. & H. R. R. Co.*, 279 U. S. 377, the problem seemed to be settled when the court upheld the New York practice making it *discretionary* with the court whether to entertain an action by a non-resident against a foreign corporation. This case, says Mr. Justice Frankfurter, "sustained the power of a state to apply the principle of *forum non conveniens* to suits under the Act brought in its courts by non-residents."[4] Of course, this decision upheld the right of state courts to use such discretion, *but it is difficult to see on what grounds the same right could be denied to federal courts under the same circumstances* where Congress has not prescribed a different rule. In 1932, in *Canada Malting Co.* v. *Paterson*, 285 U. S. 413 ff., this court upheld the right of a court to decline a case that "in the interest of justice" ought to be tried elsewhere.[5] (See other cases cited by Mr. Justice Frankfurter in 314 U. S. 44, 55.) Since then, two cases (*Baltimore & O. R.* v. *Kepner* (1941), 314 U. S. 44, and *Miles* v. *Illinois Cent. R. R. Co.* (1942), 315 U. S. 698), seem to have opened the door once again to the doctrine that any forum is the right forum, despite reason, precedent, and justice. But viewed rightly, these two cases support no such loose interpretation. In essence, they deal with the efforts of states to enjoin their citizens from entering suits in extra-state courts. This court found in each case that the state has no such power of injunction over its citizens. The citizen, this court declared, has a right to seek redress under the Federal Employers' Liability Act wherever he wishes.

This curb on the power of the state to control its

[3] 43 Harvard Law Review, 1233.
[4] Dissenting opinion in *Miles* v. *Illinois Central*, 315 U. S. 698.
[5] Dissenting opinion in *Miles* v. *Illinois Central*, 315 U. S. 698.

citizens, however, should not be distorted into a mandate to every court to hear every case brought before it. The two things are by no means the same. In the *Kepner* decision (314 U. S. 44) a state court of Ohio was prevented from enjoining a resident of that state from prosecuting a cause in a federal court of another state; and in the *Miles* case (315 U. S. 698) a state court of Tennessee was prevented from enjoining a resident of that state from prosecuting a cause in another state's courts. It is difficult to see how these two decisions can possibly be construed as compelling any court to hear any case which is brought before it and over which it may have jurisdiction. The decisions have the effect of circumscribing the powers of state courts; but as general statements of policy they have no relation to or bearing upon the issue sought to be pressed by respondent.

It is true, however, that one brief sentence in Mr. Justice Reed's decision in the *Miles* case (315 U. S. 698) may have a slight relationship here. The sentence is: "The Missouri court here involved must permit this litigation." (The litigation was brought to Missouri by a citizen of Tennessee.) This sentence seems almost gratuitously inserted, and, in being a mandate to the Missouri court, it passes beyond the bounds of the problem raised in the case. Mr. Justice Jackson, though concurring in the majority opinion, took exception to this sentence, as follows:

> "It is very doubtful if any requirement can be spelled out in the Federal Constitution that a state must furnish a forum for a non-resident plaintiff and a foreign corporation to fight out issues imported from another state where the cause of action arose."

Except for this one sentence to which Mr. Justice Jackson objects, nothing in either the *Kepner* (314 U. S. 44) or the *Miles* (315 U. S. 698) cases lends the faintest support to respondent's contention that the district judge

the Federal District Court, Southern District of New York, erred in refusing to try this case. This is made clear by Mr. Justice Frankfurter in his dissenting opinion in the *Kepner* case:

> "The opinion does not deny the historic power of courts of equity to prevent a misuse of litigation by enjoining resort to vexatious and oppressive foreign suits. * * * Nor does it question the familiar doctrine of *forum non conveniens*, under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere * * * These manifestations of a civilized judicial system are firmly imbedded in our law" (314 U. S. 44, 56).

Nothing in either the *Kepner* (314 U. S. 44) or *Miles* (315 U. S. 698) cases, or in any other case, justifies the contention that a district judge may not, for good reasons, refuse to try *certain imported cases*. Mr. Justice Frankfurter further says in his dissenting comment on the *Kepner* case:

> "It does not comport with equity and justice to allow a suit to be litigated in a forum where, on the balance, unnecessary hardship and inconvenience would be cast upon one party without any compensatingly fair convenience to the other party, but where, on the contrary, the suit might more conveniently be litigated in another forum available equally to both parties * * * The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public. This doctrine has been consistently followed in a series of unanimous decisions" (314 U. S. 44, 57).

2.

The trial judge did not abuse discretion in refusing to entertain jurisdiction of this imported case.

This is a case localized from every standpoint in Lynchburg, Virginia, yet it was taken to New York City for trial. Unlike those cases arising under the Federal Employers' Liability Act, which prompted Mr. Justice Jackson in *Miles* v. *Illinois Central Ry. Co.*, 315 U. S. 698, to put it, that the effect of the Act's venue provisions is to permit a plaintiff to "go shopping for a judge or jury inclined to be more favorable than he would find in his home forum", there is no Federal statute which denies the application of the rule of *forum non conveniens* to this class of action.*

In this case the liability of petitioner depends upon whether it was or was not negligent in certain of its operations *localized in Lynchburg, Virginia*, or whether respondent was guilty of contributory negligence in several particulars and, ordinarily, such operations cannot be made intelligible to the average juror except by oral explanation (and frequently with the aid of maps, models or other exhibits) by those who actually operate or work about the particular instrumentalities involved. Since all the witnesses reside in another state they cannot be compelled to testify in the courts of New

* The enormity of the traffic in imported F. E. L. A. lawsuits and the consequent need for a decision by this Court which will limit such reprehensible practice to F. E. L. A. cases, can be appreciated by perusal of an article entitled "*Interstate Commerce in Damage Suits*", 29 Journal of the American Judicature Society, 135-144, 146 (February, 1946), written by Glenn R. Winters, Secretary-Treasurer of the society and editor of its Journal and by reference to Henderson, *The Exportation of Personal Injury and Death Claims*, 13 Detroit Bar Quarterly 12 (1945). The same evil of importing lawsuits which is seen flowering in the case at bar should be nipped in the bud by a reversal of the decision of the Circuit Court of Appeals in this case.

York and, as shown by the record (R. 22) one of the most important of these witnesses has expressed his unwillingness to leave his place of business in Lynchburg, Virginia, and go to New York City for the purpose of testifying in this trial. The importance of his testimony is obvious since he owned the truck that was making the delivery of gasoline to respondent's place of business at the time the fire occurred. The practice of importing into distant forums this type of litigation likewise prevents a view by the jury of the premises, facilities or instrumentalities involved, and thereby encourages and facilitates confusion, distortion and misrepresentation of the pertinent physical facts. Such confusion operates to the advantage of a plaintiff asserting a claim of doubtful merit. Such practice enables the claimant in such a case to take the defendant by surprise by offering testimony and making factual contentions which such defendant may have no reason to anticipate and which it cannot meet because of its inability to obtain witnesses on short notice and from far distant places during the course of the trial.

In contrast to all these reasons why the case should not be tried in New York respondent offers as an excuse for importing this litigation that one or two of the experts whose testimony will be required reside in New York (although many more reside in North Carolina and Virginia) and that the sum involved is so large that it "may stagger the imagination of a local jury, which is surely unaccustomed to dealing with amounts of such a nature" (R. 50).

It comes to us from a usually reliable source that very few people either in Virginia or in New York have had intimate dealings with sums of $400,000, yet respondent's counsel, whose argument is reminiscent of a Senator Claghorn's in reverse, would imply that Virginia could produce for this case nothing but a jury of yokels who would be more dazzled by big money than the average patron of Manhattan's penny arcades, five cent subways,

and ten-cent Coney Islands. The argument seems neither reasonable, nor democratic, nor American.

From the facts set forth in petitioner's supporting affidavits to its motion to dismiss and the decisions of the New York courts, both Federal and State, there is nothing which suggests any good reason why the district court should accept jurisdiction of this action. There is nothing in the case beyond the possible convenience of respondent's counsel which suggests that it might be better tried in New York than in Virginia, the situs of the alleged tort. To the contrary, every substantial element involved suggests that the district court should decline jurisdiction. The trial of this action in the New York court will be attended with difficulties which would be avoided without hardship to respondent if this action be brought in the jurisdiction where service can be had on all witnesses and all necessary and proper parties may be brought before the court and where the cause of action arose.

The facts in the case at bar were fully explored by the trial judge and after a full hearing he unquestionably felt that a positive injustice would be done to petitioner if this perambulating respondent was permitted to maintain his cause of action in New York and thus place petitioner in the handling of its defense of the case at a serious and inexcusable disadvantage.

Conclusion.

It is respectfully submitted that the decision of the court below should be reversed and the judgment of the trial court be in all things affirmed. The indisputable facts compel the conclusion that respondent should be restricted in his quest for relief to the courts which are available to him, both Federal and State, at his own doorstep in the City of Lynchburg, Virginia. To permit respondent to import this case to the New York court and compel peti-

tioner to defend itself hundreds of miles away from the situs of the cause of action and where all the witnesses reside will create a serious disadvantage to petitioner in properly presenting its defenses, which the law does not impose upon any litigant.

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